FILED
MAR 27 1970
JOHN F. DAVIS, CLERK

No. 1365

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN LOOKRETIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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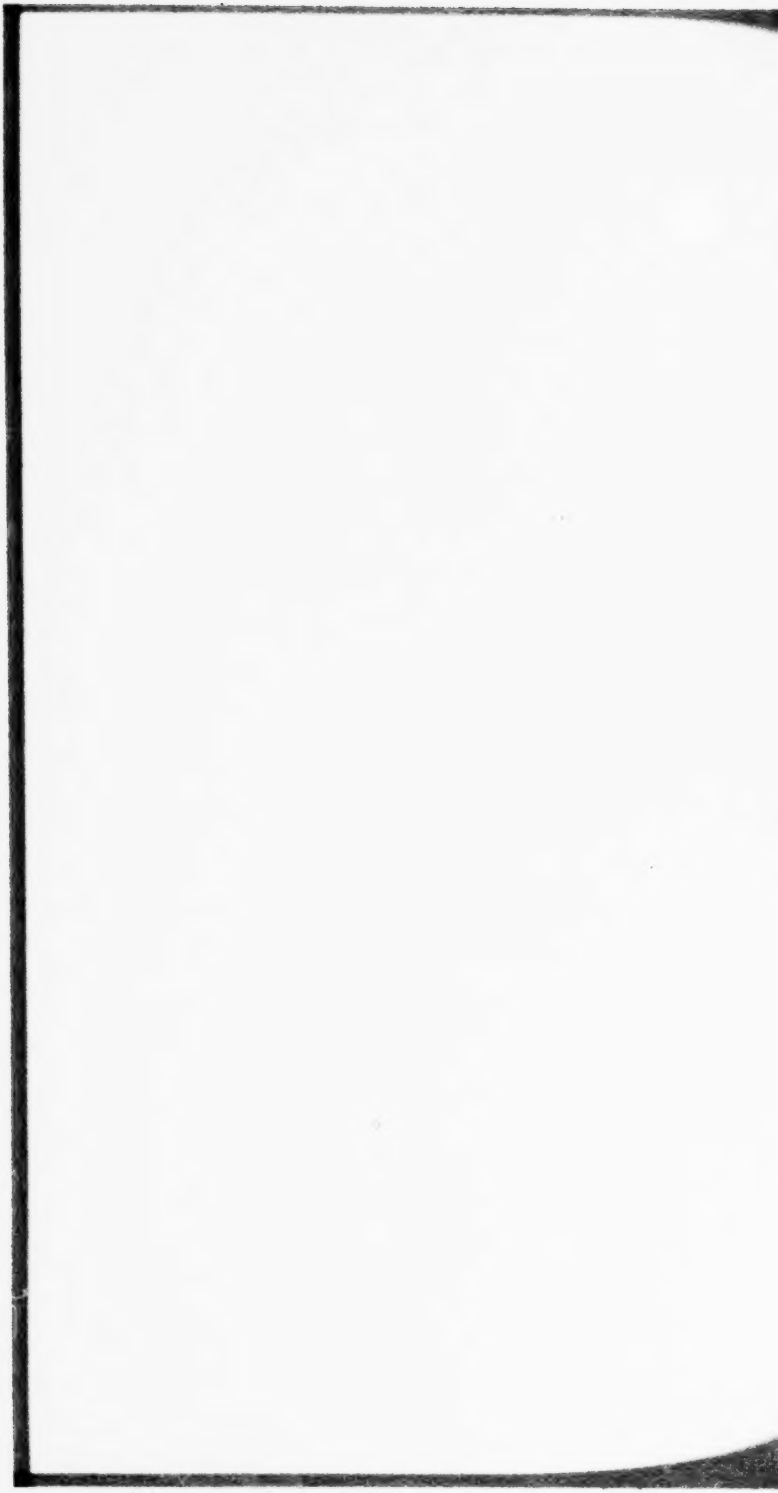

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Petitioner, John Lookretis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Indiana, Hammond Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1970, Appendix A. A Petition for Rehearing was denied by an order entered February 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Where the District Judge makes all inquiries on voir dire of the prospective jurors, and in the course of it, examines them about the crime of bookmaking and their participation and attitude toward it, and in his final charge reads to the jury Indiana Statutes mentioned in the indictment prohibiting bookmaking as an Indiana crime, and timely objections were made to the instructions; and where it is contended that this submission of crimes not charged by the indictment or described by the Bill of Particulars invited conjecture on the part of the jury and left it empowered to find the defendant guilty of horse bookmaking for which there was no proof, should there not be a reversal?

2. Did the Court err in denying the defendant's motions for acquittal for insufficiency of proof beyond a reasonable doubt?

a. Was the evidence sufficient to prove that the defendant engaged in any business enterprise involving gambling, as charged in the indictment, at the time and place averred in each of the respective counts?

b. Did the evidence prove beyond a reasonable doubt that the defendant was conducting a business enterprise involving gambling, concerning to wit, pro-

fessional baseball, in violation of any of the Indiana statutes designated and charged in the indictment, and specified in the bill of particulars?

c. Where there was a total failure of any proof of the nature of the alleged business enterprise involving gambling; and not a scintilla of proof as to the nature or kind of bet, if any; and no proof of the benefit to or use by the defendant of the Western Union facilities to promote or facilitate any business enterprise involving gambling, has the indictment been proved against him beyond a reasonable doubt, and has the presumption of innocence been overcome?

d. Was there any proof of the intent required by Section 1952, Title 18?

3. Did the Court err in charging the jury and in refusing requests to charge presented by the Petitioner?

4. Is this prosecution authorized by the statute? If so, is the statute constitutional as so applied?

5. Should the indictment have been dismissed as defective?

STATUTE INVOLVED

TITLE 18, UNITED STATES CODE.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceedings of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violation under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

STATEMENT OF THE CASE

NATURE OF THE CASE AND ITS DISPOSITION

This is an appeal from a conviction after trial before a jury. This was the second trial of the case, which was originally tried upon stipulation of facts, with a resulting conviction which was reversed, *United States* v. *Lookretis*, 398 F.2d 64 (July 15, 1968).

The indictment was returned December 9, 1965, and the first Count charged that on or about July 20, 1965 at East Chicago, Indiana, the defendants, "John Lookretis and

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Anthony Opollo did use a facility in interstate commerce, to wit: the wire facilities of the Western Union Telegraph Company, which facilities operated between Chicago, State of Illinois, and East Chicago, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling offenses, that is to say, gambling, betting and wagering on sporting events, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2310, 10-2311, 10-2331, and 10-2333, and that said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on, and establish the said unlawful activities, all in violation of Title 18 U.S.C. Sections 1952 and 2." (R. 2, A. 10)

Count 2 charged the same offense in the same language except that the date of the offense charged was July 21, 1965, and Count 3 charged a similar offense on September 28, 1965. (R. 2-3, A. 10-11) The defendant, Lookretis, moved to dismiss the respective counts of the indictment on the following grounds:

"1. All of the aforementioned counts of the indictment are vague and indefinite in that they do not allege nor state so as to clearly inform the defendant whether the alleged interstate facility was used by the defendant personally in interstate commerce and specifically from East Chicago, the State of Indiana to Chicago, the State of Illinois.

2. Neither of the aforementioned counts of the indictment charge an offense with a reasonable degree of certainty so that the defendant may be informed of the nature of the charges made against him so as to enable him to make and prepare his defense thereto.

3. That Section 1952, Title 18, U. S. Code is unconstitutional in that it is vague and indefinite and further it constitutes an infringement and violation of the constitutional right of free speech and freedom of the press.

4. Neither count of the indictment alleges nor states with precision and certainty whether the defendant performed or attempted to perform acts to promote, manage, carry-on and establish the alleged unlawful activities nor is it stated or alleged what specific "acts" is the defendant charged with performing or attempting to perform so that the defendant can be informed of the nature of the charges." (R. 7-8, A. 12-13)

The government was required to file a bill of particulars (R. 18-20, A. 18-20). This bill of particulars contended that the defendant, acting through an employee, sold certain tickets upon which money pay-offs were to be made to persons holding tickets with certain number combinations which were to be determined by statistics of the teams whose numbers were contained under the tab of each particular ticket; and that the statistics of the baseball games played that day were received by employees of the defendant from the interstate wire facilities of the Western Union Company and posted on a blackboard.

At Page 24 of the transcript (A. 46), the trial judge made the following statement to the prospective jurors:

> "You have heard the nature of the charge against the defendant in this case. This Statute under which he is being charged is what is called interstate transportation in aid of racketeering and provides in substance, that whoever travels or uses a facility in interstate commerce, that is, a facility that crosses a State Line, in aid of certain activities that are criminal in the State in which they are used, in this case gambling,

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is guilty of a Federal offense under certain sections, which I will instruct you on more thoroughly at the conclusion of the case."

In this paraphrase of the Statute, the Court omitted entirely any question of intent, general or specific, as being a part of the offense. This was immediately followed at Tr. 24, A. 46, with the following inquiry:

> "Do any of you have any prejudice against a person charged with this offense simply because he is charged with violation of the law? I think the defendant is alleged to have been *a proprietor of what is generally known as the Forsythe Club* located on Indianapolis Boulevard in the City of East Chicago." (Not in the indictment.)

The next page of the transcript, Tr. 25, A. 47, then contains the following question to the venire as a whole:

> "Do any of you have any prejudice against the Government for having brought a charge of this sort against the defendant?
>
> "Are any of you patrons of horse betting places, particularly at bookies, other than at the track, or have you been in the past engaged in horse betting?" (Not in the indictment or proof.)

Immediately thereafter, the Court then asks (Tr. 25-26, A. 47-48):

> "Have any of you ever participated in what is known as baseball pools where you draw a number and bet on the outcome of baseball games? (Not in the indictment.)
>
> "Well, there seems to be quite a few.
>
> "What is your name, I will take you first."

And following that, the Court made the statement:

> "No, you draw a number out of a jar or off of a board and if your score is similar to that or the same, you win." (Not in the indictment or proof.)

Later in the voir dire, the Judge engaged in the following exchange with prospective juror Wehner (Tr. 63, A. 52):

"The Court: Mr. Wehner, I think you had your hand up when I asked you if you ever engaged in any baseball pool activities and I think you explained this was in connection with people in the shop each putting up a certain sum of money and drawing tickets from a hat, something of that sort.

"Juror Wehner: That is correct.

"The Court: Q. Did you ever visit a horse book?

A. No, sir.

Q. Did you ever take chances on a so-called baseball pool, printed chances?

A. No, your Honor.

Q. You have heard the nature of the charges here. Is there anything about these charges that would prejudice you against the Government for having brought these charges?

A. No, your Honor."

Tr. 55-57, A. 50-51, reveals the following exchange with prospective juror Speelman:

"Juror Speelman: I would like to explain that, it has been 12 or 15 years ago that I was in a horse book.

The Court: Q. You were in there to make a bet?

Juror Speelman: A. Yes.

The Court: Q. Were you a frequenter of the place at that time, or did you just happen to go in?

A. No, I was not.

Q. You just went in how many times, would you say?

A. Oh, possibly in my life I might have been in a horse book maybe ten times.

Q. You say you have not been in one for ten or more years?

A. That's correct.

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Q. You have heard the nature of the case here involved today, the general nature, and that is that the defendant is charged with the use of interstate facilities to aid in a gambling activity carried on allegedly in the State of Illinois in violation of Indiana law. Do you understand?

A. Yes.

Q. Is there anything about your past activity that would in any way prejudice you for or against the defendant in this case?

A. Well, I did take advantage of those circumstances that one time.

Q. The defendant is not charged with running a horse book, you understand that?

A. I know. I did use the facilities. Now, I would say that if the evidence comes out here and proves he did or didn't, I would just weigh it in that fashion.

Q. You would follow the evidence?

A. Yes, sir."

The Court, prior to the taking of evidence on motion of the defendant, directed the government to abstain from any proof not pertaining to the allegations of the bill of particulars (Tr. 76-79).

At the close of the government's evidence, the Court denied the defendant's motion for acquittal and his renewed motion at the close of all evidence. The defendant rested without presenting any evidence (A. 41).

The defendant presented 3 requests at the conference on instructions, one of which was a requested interrogatory to the jury asking "which, if any, of the Indiana Statutes (I have) described was violated by the defendant?"; the second request concerned the defendant's theory of defense that the Western Union equipment was not necessary to, or had any substantial contributory effect or impact upon the sale of baseball tickets referred to

in the indictment; and the third was that "no conclusion or inference of guilty may be drawn from any circumstance unless the circumstance is proved beyond a reasonable doubt" (Tr. 242-243, A. 70-71).

Exception was taken to the refusal of the Court to submit these to the jury, and exception was taken to certain of the other instructions that were given by the Judge.

The jury returned the verdict of guilty and the Court sentenced the defendant to 5 years as to each of Counts 1, 2, and 3, 6 months of which was to be served and the balance suspended, to run concurrently. The defendant was ordered placed on probation for 5 years after institutional release and fined a total sum of $3000.00 (A. 7).

THE EVIDENCE

JOHN E. BORG, JR., called as the witness on behalf of the Government, testified that he resided in Minneapolis, Minnesota and was an employee of the Western Union Telegraph Company and had been so about 11 years, that he was in control of accounting procedures in a region embracing Chicago and Indiana (Tr. 84, A. 30, 53). Examination of his files showed billing records and installation work orders, Government Exhibits 7, 7A, 7B, which were standard contracts for installation of ticker tape baseball tickers. Government Exhibits 7, 7A, 7B and 7C were admitted without objection as documents showing application for baseball ticker tape service and billing for the said service to Forsythe Recreation (Tr. 86-91, A. 53-56).

Witness Borg then testified that the baseball ticker tape service was a service by which baseball results, hits runs and errors were produced through a machine on tape which would come out on the customer's premises furnishing

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baseball data. The witness further stated that this information was assembled at Chicago and transmitted (Tr. 92, A. 31).

On cross-examination, the witness stated that the service was limited to baseball scores and did not include horse race results; that the service was sold to newspapers and radio stations, some of which appeared on Exhibit 7C (Tr. 95-97, A. 31).

DONALD BLACK testified for the Government that he lives in Dyer, Indiana and is employed by the Western Union Telegraph Company and had been so for about 15 years and that he serviced telegraph equipment that Western Union leases through the region of Northwest Indiana and was so engaged in 1965 (Tr. 98, A. 31). He stated that he had installed a piece of equipment at the Forsythe Recreation located at 4610 Indianapolis Boulevard, which was a ticker tape. He identified Government Exhibit 7A as a document given to him at the time of installation, April 1, 1965. He identified the serial number of the machine or unit as No. 9455 (Tr. 99-101, A. 31, 56-58). BLACK testified that Government Exhibit 8 for identification was a ticker tape machine, but that he did not know whether it was involved in the order that he had identified. He said that he could see "Forsythe Recreation" written on it in indelible ink, but that the serial number was different from the one shown to have been installed by him in the work order. He then testified that the serial number on the machine, Exhibit 8, was No. 13523 (Tr. 103, A. 32, 58). The witness then said that he could not say that this piece of machinery was ever inside Forsythe Recreation, but that he could say that a piece of machinery like it was in the Forsythe premises (Tr. 106, A. 32). Witness then testified that the information transmitted to the machine comes over land lines, that is, through facility cables to the Hammond Western Union and then it is transmitted

over different land lines to subscribers such as Forsythe Recreation (Tr. 113, A. 32). The witness did not know whether there was service after 11:00 P.M. (Tr. 112, A. 32). The witness then said that after transmission of the information from Chicago to Hammond, it was then transmitted on different land lines to the respective customers in the Hammond area, each customer having his own separate land wire (Tr. 116, A. 32). The witness did not know who had written "Forsythe" on Exhibit 8 but he was sure that it was no one from his company because they usually put a "W.U." after the signature, and he further stated that the serial number on Exhibit 8 was not the serial number on the building or work order (Tr. 117-118, A. 32).

RAY HUTSON testified for the Government to the effect that he was employed by the Werts Novelty Company in Muncie, Indiana and had been so employed about 11 years, and was the Secretary-Treasurer of the Company. He produced a record showing Government Exhibit 109 showing purchases by Forsythe Recreation from Werts Novelty Company in the amounts of $156.75; $4.35; $39.33 and $122.74 during the year 1965. HUTSON testified that the merchandise normally would be "tips, tip books" (Tr. 124, A. 33).

LEONARD VOORHEES of Muncie, Indiana testified for the Government that he was a salesman for the Werts Novelty Company which is in the manufacture of tickets and punch boards (Tr. 126, A. 33). Mr. Voorhees stated that Government Exhibit 6 for identification appeared to be a product of his company. He stated that he did not have any personal business transactions with the Forsythe Recreation (Tr. 127, A. 33). He further testified that he did not know whether any tickets like Exhibit 6 were sold by his company to Forsythe Recreation (Tr. 128-129, A. 33).

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RAYMOND B. PUFUNT testified that he was an employee of the Illinois Bell Telephone Company, a Security Representative, and has general control and supervision of the company records. He identified Government Exhibit 11-B which was received in evidence as a 1965-66 telephone directory covering East Chicago, and that the document showed that the Forsythe Recreation was listed in the phone book at 4610 Indianapolis Boulevard, East Chicago, with the telephone number Export 7-9711. The introduction of the telephone book was limited to the two pages, one from the white section and one from the yellow section, showing that telephone number and address for Forsythe Recreation (Tr. 135-139, A. 33).

RICHARD K. TENGSTEDT (Tr. 140-156, A. 33, 59-65) testified that he was a Special Agent for the Federal Bureau of Investigation and had been such since June of 1962, and that in 1965 he was assigned to the Indianapolis Office and to the Hammond Resident Agency.

He said that he was acquainted with the Forsythe Recreation in East Chicago, Indiana and that he knew John Lookretis, the defendant, whom he identified (Tr. 141, A. 34). TENGSTEDT said that he had visited Forsythe Recreation on four separate occasions, July 20, July 21, July 23 and September 29 of 1965.

TENGSTEDT further testified that on July 20, 21 and 23, 1965, the place was open for business and there were people within the location, that he saw what he called a Western Union ticker tape; and that there was a large blackboard affixed to the south wall in the same room. He said there was also a counter area on the north wall where an individual would make sales and conduct business, and that there were tables also through the room where some individuals were playing card games (Tr. 142, 143, A. 34, 59).

TENGSTEDT said he saw numerous individuals on July 20 and 21 approach a man behind the counter and ask for baseball tickets and that on both of these days there were two individuals who would provide them with pull tab-type tickets in exchange for money. He also saw the Western Union ticker tape machine that was there in operation, and he watched an individual read the tape from the Western Union ticker tape and then walk directly from this machine to the blackboard and make "appropriate notations" on the blackboard concerning baseball teams (Tr. 143, A. 34, 59). The individuals behind the counter were Mr. Lookretis and the other person was a Mr. Glen Berkowicz.

TENGSTEDT stated that on July 20 and 21, he observed other patrons or individuals go to the counter and ask the man behind the counter for baseball tickets, giving money in exchange for the baseball tickets. Tengstedt walked up and asked the man for a baseball ticket and gave him a dollar and received four of the pull-type tab tickets. This was on July 20, and this transaction was with the man who he later determined was named Berkowicz (Tr. 144, A. 35, 60). On July 21, he had the same transaction with Mr. Lookretis, giving him a dollar for four baseball tickets. He said that at the time of his purchase from Lookretis, he told Lookretis that he did not think he could recall which team was represented by which number that appeared on the blackboards, that the various baseball teams had various numbers assigned to them. Lookretis did not say much of anything. He said, "There is a lot of numbers, a lot of teams." TENGSTEDT testified that he said, "I don't know if I can remember which team has got the number I might win with." TENGSTEDT said that Lookretis then proceeded to provide a piece of paper and pencil so TENGSTEDT could copy down some of the names of teams and numbers that were on the blackboard so that

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he could identify which numbers were teams. That was the extent of the conversation (Tr. 146, 154, A. 35, 61, 65).

On September 29, 1965, Agent TENGSTEDT executed an arrest warrant and a search warrant, arresting Lookretis and searching the premises of the Forsythe Recreation and took into their possession a Western Union ticker tape and blackboard along with items at the counter area, including a cigar box containing currency and pull tabs. They also made a search of the premises and found what Tengstedt had described as baseball tickets. The ticker tape was not in use at the time of the raid and seizure. The Agent identified Exhibit 8 as the ticker tape that was seized and stated that it looked like the one he had previously observed (Tr. 148, A. 35, 62).

TENGSTEDT identified Government Exhibit 12 as the blackboard he took from Forsythe Recreation the 29th of September. Objection to the admission of Government Exhibits 8 and 12 on the ground that there was no identification of them as having been used on the 20th and 21st of July and no identification of the entries on the blackboard as having been made at any specific time or whether they were current or for any purpose whatsoever (Tr. 151, A. 36). Government Exhibit 1 was identified by TENGSTEDT as consisting of what he said was four baseball tickets that he acquired for the "investment of one dollar on July 20 at Forsythe Recreation". Government Exhibit 2 were four tickets that he purchased on July 21 for the consideration of one dollar at Forsythe Recreation, and the purchase on the 21st was from the defendant, Lookretis. Defendant objected to the characterization by the witness of the tickets as "baseball" tickets because there was nothing about the tickets which indicated that they were. This objection was overruled (Tr. 152, A. 36).

The witness stated that when he was at Forsythe Recreation on July 23, he did not see any winning numbers which represented his teams on the Board, and that Lookretis never said anything to him about whether winning numbers would be posted in the business establishment, and stated that he did not have any winner, and that he did not see anyone win (Tr. 154-156, A. 36).

TENGSTEDT further said that he opened the tickets to see what numbers were contained therein to compare them against the teams which contained similar numbers so he would know what team he had.

HARRY MARSHALL of East Chicago, Indiana said he was self-employed in the tavern business and owned the building which contained his tavern at 4612 Indianapolis Boulevard and the Forsythe Recreation at 4610. He said that he owned it in 1965, and that he collected rent from Mr. Lookretis at the rate of $300 per month during the year 1965, and that he had never paid attention to the nature of the business conducted at Forsythe Recreation (Tr. 157-160, A. 37).

ALLEN McCREIGHT, Special Agent, Federal Bureau of Investigation, was working for the Bureau in 1965 in Hammond, Indiana, and he became acquainted with a business establishment in East Chicago known as Forsythe Recreation, and he was there in 1965 (Tr. 161-162, A. 37). On September 28, 1965, at approximately 7:44 P.M., he entered the establishment of the Forsythe Recreation and arrived in a room which he called a booth-type area. McCREIGHT stated that on the left side of the room, he noticed a blackboard containing American and National League baseball teams which were numbered from 100 to 120. Witness also noted a final score of a game in the American League between California and Boston, which was 4 to 3 (Tr. 163, A. 37). The witness then identified

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Government Exhibit 12 as the blackboard which he saw and stated that on September 23 he saw an individual writing on the blackboard after apparently reading from a paper tape. He did not know who the individual was. He said Government Exhibit 8 was the box of the tape he saw on that evening (Tr. 165, A. 37). The witness paid one dollar and got three pull tab-type tickets on September 28, and found that each ticket contained a set of numbers. He identified these tickets as being contained on Government Exhibit 6. Government Exhibit 6 was admitted over objection (Tr. 169, A. 37), and the Exhibit was immediately passed among the jurors.

McCREIGHT said that he purchased Government Exhibit 6 from a man whom he could not identify, who stated in effect that these were baseball tickets (Tr. 175, A. 38). The witness further stated that he did not remember correlating the tickets with the numbers assigned on the Board, that he only opened them, and that he left the establishment (Tr. 175, A. 38). McCREIGHT identified Government Exhibit 12 as the blackboard that was confiscated on September 29, 1965, and stated that he had never examined the tape that came out of the black box (Tr. 176, A. 38, 65).

JULIUS MARCINEK testified that he lived at 1002-151st Street in East Chicago, and had worked for Du Pont for 40 years, and he had visited the Forsythe Recreation establishment on Indianapolis Boulevard several times in 1965 but that he did not know John Lookretis at that time. He recognized the tickets composing Government Exhibit 6 as looking something like tickets he bought in 1965; and he recognized Exhibit 12 as a blackboard that was at the Forsythe Recreation. He said that Exhibit 8 looked to him like a tape recorder (Tr. 181, A. 38). Witness said that he did not know what the numbers on the tickets

represent, but that they represented a baseball team. He said that he had won one time on tickets at the Forsythe Recreation, and did not know what the amount was, maybe something like $5.00, and that he was paid (Tr. 183, A. 38).

EDWARD R. BETHUNE, JR. testified that he was a practicing lawyer in Searcy, Arkansas, and that prior to this, he was a Special Agent of the F.B.I. and that he had worked for the Hammond, Indiana Resident Agency during 1965, and that in 1965 he had occasion to visit the Forsythe Recreation in East Chicago; that the exact dates were September 28 and 29. The witness said that he made two trips to Forsythe Recreation on the 28th, the first one at about 3:00 in the afternoon (Tr. 185, A. 39). He saw a chalk board with writings on it containing the names of baseball teams, football teams, but there were no scores on the Board at that time. He saw a machine in front of the Board similar to the machine in the courtroom (Government Exhibit 8). Government Exhibit 12 was the chalk board which he saw. Government Exhibit 8, which appeared to be a ticker tape machine, was located on a stand which consisted of a pole underneath which elevated it off the ground, and there was a little piece of yellow tape hanging out of the machine. The witness looked at the machine, and it had the word "attendance" on it and that was all (Tr. 187, A. 39).

On the evening of September 28, the witness returned to Forsythe at about a quarter of eight and stayed about a half-hour. He stated that at that time, the board to his left was attended by an individual who was marking scores on it which were being called off to him by another man at the ticker tape machine. He heard the individual reading scores from the machine say to the individual posting the scores, "Nothing for Baltimore in the top of the 4th", and the man attending the board recorded a zero in the

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top of the 4th for Baltimore. The witness noted that those numbers were not on the board as it appeared in the courtroom. He estimated that about 40 people were present, and that during the time he was there, he made a purchase of some tab cards from an individual behind the counter whom he did not recognize. BETHUNE said that he said, "Are these baseball tickets?" The man nodded, indicating they were. BETHUNE took a dollar out and gave the man the dollar and asked how many he could select and was told he could take three, so he took three. He identified Government Exhibit 5 as the three tabs he purchased for a dollar that evening because they had his initials on the back of the tickets he purchased that evening (Tr. 190, A. 39, 67).

BETHUNE said that on opening the tickets there were numbers inside, and that in the three he bought, the numbers were 106 over 117; 117 over 119; and 115 over 119. Government Exhibit 5 consisting of the tickets identified by BETHUNE, was admitted over objection that no proper foundation had been laid for admission against the defendant (Tr. 191, A. 40, 68).

BETHUNE continued to describe the tickets as follows:

"Mr. Kimbrough:

"Q. I show you the Exhibit 5 again, and ask you, by looking at those can you ascertain, by looking at this board, what the significance of those numbers is?

"A. Well, the top number indicates the high scoring team for a day, and the bottom number indicates the low scoring team for the day. If you chose this ticket and the results of that day occur in that fashion, you win. This 117 or 119 would be Minneapolis Twins, that would be the top team of the day, highest scoring

team of the day, and the White Sox would be the low. That is my understanding of the tickets.

"Q. Fine.

"A. That was the only occasion I ever purchased them.

"Q. Fine, thank you." (Tr. 192, A. 40).

On cross-examination, BETHUNE testified that he didn't understand what a baseball ticket was and that he supposed that it was from some other agent that he acquired this explanation of what the tickets might mean, probably in conversation with other agents (Tr. 193, A. 40).

HENRY C. HASTINGS testified for the Government that he was a Reference Librarian at the Gary Public Library and produced Exhibits 13 through 18 which were microfilmed copies of what Mr. Hastings said were library editions of the Gary Post Tribune. These were admitted over objection that the originals were not produced and no explanation was made for their absence, and that in any event they were not material (A. 40-41).

TONY OPPOLO testified that he lived in East Chicago and had done so for 45 years; that he was acquainted with Mr. Lookretis at 4610 Indianapolis Boulevard, and that this place of business was there during July, August and September, 1965. Oppolo testified that although Lookretis had a ticker tape in his place of business, he could not identify Government Exhibit 8. Oppolo identified Exhibit 12 as a blackboard that he had seen in the front room of the Forsythe Rcreation, but he did not know what its purpose was, and that he had never seen it being used. He never saw the ticker tape being used, but that sometimes he heard it, it was only ticking (Tr. 210, A. 41). He stated that he did not know whether Mr. Lookretis' business had

anything to do with baseball. Oppolo further testified that he did not know how many employees Mr. Lookretis had, that he did not know what they did (Tr. 211, A. 41). He had seen things similar to Exhibit 6 on the ground floor of the establishment, although he did not know whether they were sold on the premises because he paid no attention.

The Government rested and the defendant moved for acquittal at the close of the Government's evidence (Tr. 215, A. 41), which motion was denied (Tr. 227, A. 41).

The defendant rested without presentation of evidence (Tr. 227, A. 41), and renewed his motion for acquittal at the close of all evidence, which motion was overruled (Tr. 227, A. 41).

REASONS FOR GRANTING THE WRIT

Th Courts below have denied the petitioner his right to due process of law and his right to a fair trial by jury as established by the Constitution and interpreted by the decisions of this Court.

1. THE COURT ERRED IN INSTRUCTING THE JURY.

A. It is respectfully urged that the trial court erred substantially and committed plain error in his remarks, or instructions to the jury, on the voir dire examination of prospective jurors.

The Court opened this examination by reading the indictment in its entirety and then reading the statute (Tr. 12, A. 42).

It is submitted that both the indictment and the statute are so vague and indefinite as to fail to inform the jury concerning the conduct complained of, that is, the cause and nature of the offense. While reading the indictment and paraphrasing the statute involved frequently are appropriate at the commencement of a trial, nevertheless, where the indictment and the statute are so complicated that they will confuse the listening prospective jurors, then a simple statement of what the court understands the charge and the law to be would be less likely to lead the jury astray.

For instance, included in the indictment is the allegation that 6 Indiana Statutes were violated, but only the numbers of those Statutes are set forth in the indictment, and obviously the Grand Jury was not induced by the evidence before it, to state what conduct it considered to be in violation of the Indiana Statutes.

It is urged upon this Court that the exchanges with the prospective jurors and the venire of prospective jurors, took place before any word of evidence had been heard concerning baseball pools. The only one to give any explanation of the operation of a baseball pool, during the entire trial, was the Judge during this voir dire, and his apparent knowledge was so incomplete that it did not inform the jurors, but did furnish a basis for speculation somewhat similar to the speculative descriptions later given by the government witnesses (A. 46-52).

Why the Judge was impelled to ask whether these prospective jurors were concerned with book making or had been customers or engaged in it, is not apparent in the face of the record or the evidence on this trial.

If counsel had indulged in such questions during the voir dire, the questions would have merited a rebuke. The implication that the petitioner was concerned with bookmaking, or that bookmaking was carried on in the premises where he was arrested, could only damage the petitioner and mislead the jury, especially when it is considered that one of the Indiana Statutes, the number of which was mentioned to the jury in the voir dire, Section 10-2307, was read by the Trial Judge to the jury in his final charge at T. 303, A. 77, and the Court told the jury that this Statute makes it a criminal offense to lose or win any article of value by playing or betting at or upon the results of any game or horserace or trial of speed between man or animal. Thus, the Judge injected bookmaking into the trial and later compounded the error in his final charge.

While counsel did not interfere with the Judge's voir dire, objection was taken to the submission, in the final charge to the jury, of the content of Burns, Section 10-2307 as not being applicable to the evidence or to the Federal

Statute involved. The Federal Statute provides for "business activity" involving gambling, and it is obvious that anyone could violate Burns, Section 10-2307 without conducting a "business enterprise" or "business activity". The total failure of proof of any kind regarding horse-racing or other contests of speed or strength between man or beast made it inappropriate and prejudicially erroneous to introduce the subject on voir dire and to paraphrase the Statute in the final charge (Tr. 236, 303, A. 77).

B. The petitioner objected to the Court's insistence that the only intent concerned in the case was an intent to violate Indiana Statutes (Tr. 234, 235, A. 68-69). It is heretofore stated the petitioner objected to the recitation of Statutes involving conduct which would not be a business enterprise or activity, and thus was not related to Section 1952, Title 18 (Tr. 236, A. 70). Further objection was made to the giving in total of the contents of Burns, Sections 10-2310, 2311 and 2331, since there were many parts of these statutes as they were read to the jury (Tr. 303-305, A. 77-78), which did not relate to the charge and opened up opportunities for speculation and conjecture on the part of the jury with regard to horse book betting, cards, and other forms of gambling not related to or involved in the charge. In effect, the jury was told that violation of any of the Burns Indiana Statutes read to them and the use of the Western Union ticker compelled a finding of guilty (Tr. 301, 303, A. 76-77).

The petitioner excepted to the giving of Government's request No. 4 which was read by the Judge to the jury in his final charge at Tr. 301, A. 76. This instruction that the ticker installed in Forsythe Recreation was a facility contemplated by the Statute, and the instruction which continues at Tr. 303, A. 77, concerning the use of the facility for "gambling, betting and wagering on sporting events",

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together with the statement that use in legal activities at the same time that the wire facility was used for illegal ones would not "destroy the prescribed intent, and that the intent element of Section 1952 would be satisfied", clearly was confusing and ambiguous and conducive to speculation as well as persuasive of guilt (Tr. 302, A. 76).

The trial judge again offered the opportunity to speculate at Tr. 305, A. 78, when he told the jury that it was not necessary for the government to prove that the petitioner performed or attempted to perform acts which violated all of these Indiana Statutes. This left the jury free to convict if they found card playing or horse betting occurred on premises with the ticker.

The government was excused from the Judge's final charge from proving even general intent to violate the federal Statute, since no instruction was given on the subject of general intent, and the following sentence was included in the charge:

> "The government is not required to prove that the defendant specifically intended to violate a federal law." (Tr. 308, A. 80).

2. THE COURT ERRED IN OVERRULING PETITIONER'S MOTIONS FOR ACQUITTAL FOR INSUFFICIENCY OF PROOF BEYOND A REASONABLE DOUBT.

It is the petitioner's contention that the government, through negligence or inability to produce, failed to prove several essentials to establish guilt of the charges made beyond a reasonable doubt, and that therefore the petitioner's motions for acquittal should have been sustained.

The evidence relied upon to establish a baseball gambling enterprise was that of several agents of the Federal Bureau

of Investigation who testified to paying money to the defendant or other persons and receiving what they called "pull tickets". These tickets do not evidence gambling; are not self-explanatory, and do not establish gambling. The agents admittedly did not know the nature of the transactions in which they were engaged and were merely guessing at whether they were gambling transactions. They did not know the nature of the contract, if any, or the rules or conditions of any bet, if any. They had random conversations among themselves, which were not authoritative and clearly were in no position to prove that the transactions constituted gambling.

JULIUS MARCINEK testified that he had visited Forsythe Recreation establishment several times in 1965, but that he did not know the petitioner at that time. He said the tickets composing Government Exhibit 6 looked something like tickets he bought in 1965; and he recognized Exhibit 12 as a blackboard that was present at the Forsythe Recreation. He identified Exhibit 8, presumably a Western Union ticker, as appearing to him to be a tape recorder (Tr. 181, A. 38). This witness further said that he did not know what the numbers on the tickets represented, but that they represented baseball teams. He said he had won one time, and did not know what the amount was, maybe something like $5.00, and that he was paid (Tr. 183, A. 38). He gave no date for this one-time win of an unknown amount. Clearly, this was not sufficient proof of the nature of a business involving gambling or proof that it was gambling, or when.

Two employes of the Werts Novelty Company of Muncie, Indiana, produced records and testified that Forsythe Recreation was a customer of Werts Novelty Company. They stated that their business was the manufacture of "tips, tip books". These men did not have knowledge of the type

of merchandise purchased from their Company by Forsythe Recreation, and the records they produced did not indicate the nature of the material sold by Werts to Forsythe (Tr. 124-129, A. 33).

It is obvious that the testimony of these two witnesses did not lay a foundation for the conclusion beyond a reasonable doubt that the business of the petitioner was one involving gambling on baseball game results.

Two Western Union Company employees testified concerning installation of a sports ticker in the Forsythe Recreation and billing to the renter of that ticker service, and stated that baseball game results during certain hours of the day were delivered through that ticker under this type of Western Union service.

It is respectfully submitted that all of this falls far short of proof that the petitioner conducted a business involving gambling on baseball games, and that he used an interstate facility, to wit, the facilities of the Western Union Company, to aid and facilitate the operation of such a gambling enterprise or business.

While it is true that several agents saw persons posting scores upon a blackboard while talking and listening to a person who was apparently looking at the sports ticker tape, there is no proof that the contents of the ticker tape were being transcribed onto the blackboard. Nor is there any proof from which it could be concluded that this would facilitate or aid the alleged gambling. None of the agents who made purchases were able to explain the nature of what they thought was a gambling operation, and even MARCINEK, who claimed that he had won once at some unknown time, but did not know the amount, was unable to explain the significance of the alleged baseball tickets.

It is urged that it is impossible to conclude from this sparse and incomplete proof, the essential elements charged in the indictment.

There is absolutely no proof of violation of any Indiana Statute or intention to violate such a statute.

The amazing circumstance that Exhibit 8 is a Western Union ticker, claimed by the agents to have been seized on September 29, 1965, was not the ticker testified about by the government's Western Union Company employee witness, DONALD BLACK, throws further doubt upon the efficiency, accuracy and sufficiency of the government's proof. BLACK testified that he installed a machine numbered 9455 (Tr. 99-101, A. 31, 56-57). He then testified that the machine presented to him, and displayed before the jury, and admitted into evidence as Exhibit 8, was not the machine that he had installed on the Forsythe Recreation premises, and it was clear that he did not know whether this machine had ever been used, or was even capable of use. The serial number on Exhibit 8 was No. 13523 (Tr. 103, A. 32, 58).

BLACK further testified that sports news from the Western Union Company was assembled in Chicago, transmitted to Hammond by one line, and thereafter transmitted over separate lines to the individual customers on lines that ran from Hammond to the respective places of business of the recreation parlors, radio stations, newspapers, etc., who were the subscribers.

A blackboard which was admitted into evidence as Government Exhibit 12, bore the names of various baseball teams, but upon the statement of the F.B.I. agents, did not bear the numbers that they saw on the respective dates of their visits, prior to the execution of the search warrant. It is respectfully submitted that this evidence of the government set forth in the Statement of Facts in this brief,

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falls far short of proving beyond a reasonable doubt that the defendant Lookretis was guilty of the complicated charges made in the indictment, and the evidence was insufficient to overcome the presumption of innocence. It lacked both content and accuracy.

Arousing suspicion, establishing a possibility, or even establishing a probability, does not suffice to constitute proof beyond a reasonable doubt or proof that overcomes the presumption of innocence.

Guilt is personal and cannot be based on mere innuendo.

Failure of proof invalidates a conviction, *Thompson* v. *City of Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624; *Johnson* v. *Florida*, 391 U.S. 596, 20 L.Ed. 2d 838, 88 S.Ct. 1713.

3. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY UPON A THEORY OF DEFENSE AND IN REFUSING TO SUBMIT TO THE JURY AN INTERROGATORY TENDERED BY THE PETITIONER.

Th petitioner submitted a special interrogatory for submission to the jury which read as follows:

> "Which, if any, of the Indiana Statutes I have described was violated by the defendant?"

This offer was referred to and was denied by the trial judge (Tr. 242, A. 70). No instruction eliminating the impertinent Indiana Statute sections and clauses from consideration were given.

The petitioner submitted an instruction upon a theory of the defense as follows:

> "It is the theory of the defense that the government has failed to prove its case, beyond a reasonable doubt,

> and specifically has not proved that the Western Union equipment was necessary to or had any substantial contributory effect or impact upon sale of baseball pool tickets referred to in the indictment."

The petitioner was entitled to this statement of his theory of defense since the evidence did not show any substantial contributory effect or impact upon the sale of any tickets whatsoever. The denial of this requested instruction was reversible error (Tr. 242, 243, A. 70-71).

The petitioner tendered his instruction No. 3, which read as follows:

> "No conclusion or inference of guilty may be drawn from any circumstance unless the circumstance is proved beyond a reasonable doubt."

The trial judge, in his final charge to the jury, emphasized and distinguished circumstantial evidence (Tr. 313, A. 83). In his voir dire examination of the prospective jurors, the Court gave an extended description of what he conceived was circumstantial evidence, including an example (Tr. 32, 33, A. 48-49).

There was no direct evidence of gambling in this case. Under these conditions, to distinguish and emphasize circumstantial evidence without restricting the jury to the drawing of inferences only from proved facts as provided by the defendant's request No. 3, was an invitation to speculation. The total absence of proof that any bets of any kind were taken, or that gambling existed on the premises on the dates charged, certainly would have resulted in a Not Guilty verdict had not the jury been permitted to speculate that perhaps it was likely that maybe the defendant was gambling perhaps on baseball. The Court's refusal to submit the interrogatory and to give the petitioner's requested instructions was reversible error.

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The instructions permitted conjecture by the jury as to the nature of gambling violations proscribed by the Indiana statutes read to them. They should not and cannot return a verdict under instructions broader than the charge in the indictment. This is no mere technical error, for a conviction ought not to rest on an equivocal direction to the jury on a basic issue (in the case at bar, a business enterprise involving gambling in violation of Indiana statutes.) The invitation by the trial Court to apply Indiana statutes not involved or proved, was erroneous and was objected to, A. 70.

> "From presuming too often all errors to be 'prejudicial', the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."
>
> *Bollenbach* v. *United States*, 326 U.S. 607, 615, 90 L.Ed. 350, 356.

4. THIS PROSECUTION IS NOT AUTHORIZED BY THE STATUTE. IF IT IS, THE STATUTE WAS UNCONSTITUTIONALLY APPLIED, AND IS INVALID.

The petitioner contends the statute is an unconstitutional seizure of powers reserved to the states and to the people, *Ninth and Tenth Amendments to the Constitution.*

The statute, further, is so broad as to make it uncertain as to what conduct it applies, *Fifth and Sixth Amendments to the Constitution.*

The statute as applied in this case, abridges and infringes upon the right to free speech and press by encroaching upon the right to transmit and receive communication of news, that is, baseball results, by purporting to punish a purely intrastate misuse of such news, after lawful receipt in interstate commerce, *First Amendment to the Constitution.*

5. THE INDICTMENT WAS DEFECTIVE AND SHOULD HAVE BEEN DISMISSED.

The petitioner moved to dismiss the indictment for failure to inform as required by the Constitution, and for failure to be specific.

This indictment is particularly defective under the rules prescribed by the Supreme Court, *Cruikshank* v. *United States,* 92 U.S. 542, and *Russell* v. *United States,* 369 U.S. 749, 8 L.Ed. 2d 82 S.Ct. 1038.

The grand jury indictment's defects were not and could not be cured by the prosecutor's bill of particulars, *Russell* v. *United States,* 369 U.S. 749, at 769.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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